179 (2)

No. 10-572

IN THE
Supreme Court of the United States

THE REPUBLIC OF ARGENTINA ET AL.,
Petitioners,

v.

EM LTD. ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR EM LTD. AND NML CAPITAL, LTD.

DAVID W. RIVKIN
JOHN B. MISSING
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Respondent EM Ltd.

ROBERT A. COHEN
Counsel of Record
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6797
(215) 963-5000
robert.cohen@dechert.com

Counsel for Respondent NML Capital, Ltd.

QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a).

In a suit against a foreign state arising under the FSIA, must a district court apply the choice-of-law rules of the forum state or federal common law choice-of-law rules, as set forth in the Restatement (Second) of Conflict of Laws (1969)?

RULE 29.6 STATEMENT

Neither NML Capital, Ltd. nor EM Ltd. is publicly traded; neither entity has any corporate parents; and no publicly held corporation owns 10% or more of the stock of either entity.

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BRIEF IN OPPOSITION FOR EM LTD. AND NML CAPITAL, LTD.

Respondents EM Ltd. and NML Capital, Ltd. respectfully submit this brief in opposition to the petition for a writ of certiorari filed by defendants The Republic of Argentina and Banco de la Nación Argentina.

OPINIONS BELOW

The summary order of the court of appeals is unpublished but is electronically reported at 2010 WL 3001777. Pet. App. 1a. The opinion of the district court is also unpublished but is electronically reported at 2009 WL 2568433.

JURISDICTION

The court of appeals filed its order on August 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents ask this Court to reverse the summary order of the Second Circuit on the ground that the panel should have applied federal common law choice-of-law rules, as set forth in the Restatement (Second) of Conflict of Laws (1969), rather than the choice-of-law rules of New York because this case arises under the Foreign Sovereign Immunities Act (FSIA). Petitioners never raised this argument with the Second Circuit, and with good reason: The New York choice-of-law rule applied by the panel is precisely the same rule that the Second Restatement requires. This Court therefore could not reverse the judgment below even if it resolved the question presented in petitioners' favor. Moreover, even absent

that fatal vehicular problem, this Court would be unable to reach the question presented because Federal Rules of Civil Procedure 64 and 69 expressly require the application of the forum state's law for the attachment and execution remedies at issue here. Finally, to the extent the Ninth Circuit has departed from the view of the Second Circuit and at least two other circuits on the question presented, that departure has too little practical importance and too high of a likelihood of self-correction to justify this Court's intervention at this time.

The petition for a writ of certiorari should be denied.

1. Petitioner Republic of Argentina has a checkered history of defaulting on its public debt stretching back to the Nineteenth Century. *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). In late 2001, it once again repudiated all of its external public debt in the largest sovereign default in history. Respondents, holders of bonds on which Argentina defaulted, have obtained over $2.3 billion in judgments against Argentina in the Southern District of New York, which had subject matter jurisdiction over the actions under the FSIA, because Argentina is a "foreign state." *See* 28 U.S.C. § 1330(a). To date, Argentina has refused to satisfy any of those judgments. For that reason, respondents have sought to execute the judgments against the few assets that Argentina holds in the United States. Respondents have also sought prejudgment attachment orders in cases where final judgments have not yet been entered.

On May 22, 2007, respondents obtained an *ex parte* attachment order and restraining orders from the district court attaching and restraining both the corpus of a trust located in the United States called the "BH Trust" and the beneficiaries' property inter-

ests in that trust. The BH Trust was created by Argentina in 1999 in connection with the sale of a state-owned bank called Banco Hipotecario Nacional (now Banco Hipotecario S.A. ("BH")). Specifically, investors outside of Argentina were offered options to purchase American Depository Shares ("ADSs"), each of which corresponded to 10 class "D" shares in BH. When the options exercise period ended on February 1, 2004, over 9 million ADSs remained in the BH Trust, and Argentina reverted to being the Trust's sole beneficiary. Pet. App. 17a. The BH Trust now contains cash and ADSs currently worth over $70 million.

The trustee of the BH Trust is U.S. Bank Trust National Association, through its Argentine Permanent Representation. Pet. App. 17a. The beneficiaries of the BH Trust identified in the trust instrument are two so-called *fondos fiduciarios* ("fiduciary funds") called the Assistance Fund and the Infrastructure Fund for which the co-petitioner Banco de la Nación ("BNA") serves as nominal "trustee." *Id.* at 17a-18a. The Infrastructure Fund was established by the government of Argentina to "make[] loans to the federal and provincial governments to support infrastructure development." *Id.* at 19a. The sole purpose of the Assistance Fund is to hold the Argentine state's "Class A" shares in BH, and to capitalize the Infrastructure Fund as directed by Argentina's Minister of Finance. *Id.* at 18a–19a. The district court's attachment order and restraining orders were directed at *both* the corpus of the BH Trust and the beneficial interests in the BH Trust held by the Assistance Fund and the Infrastructure Fund. *Id.* at 15a.

On August 18, 2009, the district court confirmed those orders under Federal Rules of Civil Procedure 64 and 69, which require federal courts to apply the forum state's attachment and execution procedures.

Pet. App. 15a. The district court concluded that respondents had satisfied the New York law requirements for attachment and restraint against *both* the corpus of the BH Trust and the beneficial interests held in the trust. One of those requirements is that the judgment debtor—here, Argentina—hold an interest in the restrained property. N.Y. C.P.L.R. §§ 5222(b), 6214(b). The district court found that because the Assistance Fund and the Infrastructure Fund "are essentially used as discretionary funds of the Republic, and . . . the Republic ha a right to use the assets of the Funds as it wishes," they are "part of the Republic and, by extension, the Republic has the same legal rights as the Funds themselves." *Id.* at 23a. And because the Assistance Fund and the Infrastructure Fund "have a right to distributions from the BH Trust, and ultimately to the corpus of the Trust," the court held, "the Republic has these rights as well." *Id.* at 23a-24a.

The district further held that the restrained assets were not shielded by immunity doctrines set forth in the FSIA and this Court's decision in *First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). Pet. App. 29a-31a.

2. In an unpublished order, the Second Circuit affirmed the district court's confirmation of the attachment orders and restraining notices. Pet. App. 5a. The court held that the Republic and BNA had "not pointed to anything in the record that leads us to conclude that the district court abused its discretion when it found that the evidence" demonstrated that the Assistance Fund and Infrastructure Fund "are 'part of the Republic.'" *Id.* at 7a.

Argentina and BNA also argued that, aside from whether the Assistance Fund and the Infrastructure Fund were valid trusts, "the BH Trust is a valid

trust under Argentine law." Pet. App. 7a. For that reason, they said, the BH Trust's corpus could legally belong only to "the trust itself, not to the Republic" and so could not be seized to satisfy Argentina's outstanding judgments. *Id.*

The Second Circuit rejected that argument. The court first noted, citing its prior precedent, that because this case arises under the FSIA, New York choice-of-law rules govern whether the court would look to Argentine or New York trust law to determine the validity of the BH Trust. *Id.* (citing *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991)). The court then explained that "[u]nder New York law, '[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." Pet. App. 8a (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002)). "If a conflict is identified, New York requires application of an 'interests analysis' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.'" *Id.* (quoting *Karaha Bodas*, 313 F.2d at 85). "Finally," the court stated, "'New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.'" *Id.* (quoting *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987); alteration in original).

The court then applied that choice-of-law rule to the facts of the case. The BH Trust Agreement contains a provision specifying that it is to be construed under Argentine law. Petitioners contended that

this provision amounted to a broad designation of Argentine law to govern all disputes related to the BH Trust Agreement—even where the claimant was not a party to the Agreement. The respondents did not concede that this provision was ever intended to govern their motion to confirm the attachment and restraining orders; however, they did concede that the BH trust would be considered a valid trust under Argentine law.

Without passing on the scope of that choice-of-law provision in the BH Trust Agreement, the Second Circuit examined New York trust law to determine whether "enforcing the trust agreement would violate 'fundamental policies' of New York law." Pet. App. 8a. Relying on state-court precedent, the Second Circuit concluded that "'[i]t is against public policy to permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it.'" *Id.* (quoting *Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA*, 473 N.Y.S.2d 242, 246 (N.Y. App. Div. 1984); alteration in original). Because the district court had concluded that Argentina had the legal authority to direct the trustee of the BH Trust to liquidate the assets of the BH Trust, the Second Circuit found that "the assets that comprise the corpus of the BH Trust are controlled directly by the Republic." *Id.* at 9a. Thus, the Court held, "[b]ecause the Republic has the current authority to direct disposition of the corpus of the BH Trust for its own benefit, we believe that, for reasons of long-standing public policy, New York law would not recognize the BH Trust as a valid trust entitled to protection against creditors." *Id.*

The Second Circuit also affirmed the district court's conclusions that under New York law, Argentine law, and federal common law, the property of Assistance Fund and the Infrastructure Fund is

property of Argentina itself and that neither the FSIA nor *Bancec*, 462 U.S. 111 (1984), shielded the assets from seizure. *Id.* 9a-13a.

REASONS FOR DENYING THE PETITION

The summary order of the Second Circuit does not warrant this Court's review. Although petitioners now claim that the Second Circuit should have applied the choice-of-law rules of the Second Restatement rather than New York law, they never raised that argument before the Second Circuit. There was a good reason for their omission: New York courts apply precisely the same rule as the Second Restatement for choice-of-law clauses, as a number of federal and state decisions have held. Indeed, the very case that the panel below cited for New York law itself relied on the Second Restatement. Thus, regardless of how this Court answers the question presented, it would be compelled to affirm the Second Circuit, rendering this case an inappropriate vehicle for consideration of that issue. In addition, because the district court separately restrained all beneficial interests in the BH Trust—an order not challenged now by petitioners—even a reversal by this Court would not change the practical outcome of this case: Respondents would still be entitled to the assets held in the BH Trust.

Two other considerations counsel strongly against a grant of certiorari. First, even if petitioners are correct that federal common law (i.e., the Second Restatement) supplies the choice-of-law rules in FSIA cases as a general matter, that would not be true in the unique context of this case: Because under Federal Rules of Civil Procedure 64 and 69 the forum state's law governs ancillary remedies even in cases arising under the FSIA, the district court would have been required to apply New York choice-of-law rules regardless of whether state choice-of-law

rules generally apply in FSIA cases. It is therefore highly likely that if this Court were to grant certiorari, it would not be able to reach the question presented. Finally, because the Second Restatement is the dominant approach to conflict issues in U.S. jurisdictions (as it is in New York), the question presented has little more than theoretical significance.

I. PETITIONERS DID NOT PRESERVE THE QUESTION PRESENTED BELOW.

Petitioners did not argue below that it was improper for the Second Circuit to apply New York choice-of-law rules. That failure to preserve the question presented is fatal to their petition, because this Court "ordinarily will not decide questions not raised or litigated in the lower courts," even if they were passed on by the Court of Appeals. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ of certiorari as improvidently granted).

In respondents' Second Circuit brief, they argued with respect to the validity of the BH Trust that "[u]nder New York's choice-of-law rules, th[e] compelling policy [of invalidating self-settled trusts]—combined with New York's many significant contacts with [the] matter . . . —requires application of New York law to the extent it conflicts with Argentine law." Appellees' C.A. Br. 50-51. In reply, neither Argentina nor BNA disputed that New York choice-of-law rules govern; nor did either contend that the Second Restatement should control instead. To the contrary, BNA argued that respondents were incorrect that "under a New York choice of law analysis, New York's public policy against self-settled trusts requires the application of New York law to determine the validity of the BH Trust," because, in its view, the "BH Trust is not a self-settled trust." BNA C.A. Reply Br. 7-8. And in adopting BNA's argu-

ments, Argentina stated that "New York's choice of law rules would call for the application of Argentine law." Argentina C.A. Reply Br. 5.

Petitioners did not preserve any argument, even in a footnote, that the Second Circuit should reconsider its position on the question presented. Nor did petitioners file a petition for rehearing *en banc* on the issue. In fact, nowhere in their four briefs filed with the Second Circuit did petitioners cite either the Second Restatement or the Ninth Circuit precedent on which they now rely. Although petitioners state that they "asserted that Argentine law should apply to the BH Trust" (Pet'n at 15), that was Argentine *substantive* law, which they argued should apply because that is what *New York* choice-of-law rules prescribed.

This Court ordinarily will not consider an issue not raised by the petitioner below. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992). That prudential rule "help[s] to maintain the integrity of the process of certiorari." *Id.* at 646. The rule has special force here, because in the Second Circuit the assumption of both parties that New York law governs is "'sufficient to establish choice of law.'" *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir. 2000) (quoting *Tehran-Berkeley Civil and Envtl. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989). Moreover, the Second Circuit addressed the question presented in only one sentence, a quotation of its own precedent (Pet. App. 7a), and did not have the opportunity to consider the position of the Ninth Circuit because petitioners never alerted the panel to that case law. The petition accordingly should be denied.

II. This Case Is An Inadequate Vehicle Because Resolution Of The Question Presented In Petitioners' Favor Would Not Change The Outcome.

This case is not an appropriate vehicle to answer the question presented because no answer to that question could change the outcome. Because the relevant choice-of-law rule from the Second Restatement is identical to the New York law rule applied by the Second Circuit—indeed, New York state and federal courts have repeatedly cited the relevant section of the Second Restatement as encapsulating New York law—this Court would be required to affirm the judgment below regardless of how it resolved the question presented. And practically speaking, even if this Court were to reverse the Second Circuit's judgment, the result in this case would not change, because petitioners have not challenged a separate ruling by the Second Circuit that permitted respondents to restrain the beneficial interests in the BH Trust. As a consequence, regardless of how this Court rules, when the assets in the trust are liquidated at the execution phase, the proceeds will be distributed to the respondents.

A. The Second Restatement Sets Forth Precisely The Same Rule That The Second Circuit Applied.

There is an obvious reason that petitioners did not preserve their new argument that the district court should have applied the choice-of-law rules of the Second Restatement rather than New York: It is well established that "[i]n cases arising from contracts that include a choice-of-law clause, New York courts follow the test set forth in the Restatement (Second) of Conflicts of Laws." *Beatie & Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 378 (S.D.N.Y. 2006). In other words, the Second Re-

statement sets forth precisely the same test that the Second Circuit applied below. For that reason, this Court would have to affirm the judgment below regardless of how it answered the question presented.

The Second Circuit applied the rule that a court must "'honor the parties' choice [of law provision] insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.'" Pet. App. 8a (quoting *Woodling*, 813 F.2d at 551). Because the court concluded that the BH Trust violated New York's policy against self-settled trusts—a fact-bound application of state law not challenged by petitioners now—it concluded that "New York law would not recognize the BH Trust as a valid trust" even if the choice-of-law provision had designated Argentine law to apply to the respondents' motion to confirm the attachment and restraining orders. Pet. App. 8a-9a.

Section 187 of the Second Restatement sets forth the same rule that the Second Circuit applied:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2) (1969). In fact, the Second Circuit precedent that the panel below relied on for its holding cited Section 187 as the basis for the New York rule. *See Woodling*, 813 F.2d at 551. Other New York federal courts have quoted Section 187 nearly verbatim as the

standard under New York law. *See, e.g.*, *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 170 (S.D.N.Y. 2006) ("[U]nder New York law . . . a contract's designation of the law that is to govern disputes arising from the contract . . . is determinative [unless] . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state.") (internal quotation marks omitted).[1] And New York state appellate courts, including the Court of Appeals of New York, have cited Section 187 of the Second Restatement as the New York standard for New York's public-policy exception to choice-of-law provisions. *See Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500-01 (N.Y. 2006); *In re Mark Frankel*, ___ N.Y.S.2d ___, 2010 WL 4909624, at *3 (N.Y. App. Div. Nov. 30, 2010); *Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 643 N.Y.S.2d 528, 531 (N.Y. App. Div. 1996). *See generally* N.Y. Jur. § 33.

There is therefore no difference between the rule that the Second Circuit applied below and the standard of the Second Restatement that petitioners claim would be applied in the Ninth Circuit. For that reason, this Court's answer to the question presented could not possibly lead it to reverse the Second Circuit.

In an attempt to manufacture a conflict between New York law and the Second Restatement, petitioners cite a different section of the Restatement—Section 268—than the one embodying the rule applied by the Second Circuit—Section 187. Petition-

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[1] *See also Beatie*, 431 F. Supp. 2d at 378; *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 469 (S.D.N.Y. 2001) ("New York courts follow the test laid out in the Restatement (Second) of Conflicts of Laws § 187.").

ers argue that "the Republic would have prevailed" under Section 268. Pet'n at 15; *see also id.* at 3 ("[H]ad the court of appeals applied this federal choice of law rule and hence Argentine substantive law . . . ."). Section 268, however, addresses what law governs the *construction* of the terms of a trust agreement—a question not at issue in this case. *See* Restatement (Second) of Conflict of Laws § 268(1). It is Section 187 that generally governs what is at issue here—"contractual rights and duties" relating to a trust agreement. *Id.* § 187(2); *see also id.* § 187 ills. 4, 5 (making clear that Section 187 applies to trust instruments). That is no doubt why neither the Second Circuit nor petitioners themselves cited Section 268 below.[2] And in any event, the Restatement's rules governing construction of trust instruments contain a public-policy exception materially similar to the one applied by the Second Circuit, which would have led to the same result in this case even if the Second Circuit had applied Section 268. *See id.* § 270(a).

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[2] Contrary to petitioners' suggestion, New York law does not differ from Section 268; the hornbook New York law rule for choice-of-law clauses in trust instruments comports with Section 268. *See Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 794 (N.Y. 1937) ("The instrument should be construed and a determination of its validity made according to the law chosen by the settlor unless so to do is contrary to the public policy of this state."). In fact, a New York federal court sitting in diversity has applied Section 268 when necessary to resolve the issues presented by that case. *See Clalit Health Servs. v. Israel Humanitarian Found.*, 385 F. Supp. 2d 392, 398 n.9 (S.D.N.Y. 2005).

B. Vacating The Restraint On The Trust Corpus Would Have No Practical Impact.

Even if this Court were to reverse the Second Circuit's holding affirming the district court's order insofar as it confirmed the attachment and restraint of the corpus of the BH Trust, it would have no real impact on this case. That is because the district court, entirely apart from restraining the *corpus* of the BH Trust, also restrained the *beneficial interests* in the BH Trust held by the Assistance Fund and the Infrastructure Fund (which are ultimately controlled by Argentina). *See* Pet. App. 23a-24a. And as the district court explained, restraint of the beneficial interests in the trust is essentially redundant with restraint of the trust corpus: "Since it is undisputed that the Assistance and Infrastructure Funds have a right to distributions from the BH trust, *and ultimately to the corpus of the Trust*, the Republic has these rights as well." Pet. App. 23a-24a (emphasis added).

The Second Circuit affirmed the district court's holding with respect to the beneficial interests in the BH Trust (Pet. App. at 9a-10a), and petitioners do not challenge it before this Court.[3] Although petitioners claim that the procedural mechanism for executing against the beneficial interests would differ from the mechanism for executing against the trust corpus (Pet'n 12 n.9), in either event respondents would ultimately be entitled to the proceeds from liquidation of the trust's assets. It would be a poor

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[3] Because the district court held that the Assistance Fund and the Infrastructure Fund were invalid trusts under *either* Argentine or New York law, any challenge to that holding would amount only to a factbound challenge to the application of state and foreign law.

use of this Court's resources to prolong this litigation when there is no possibility that the Court's holding would affect the final disposition of those assets.

III. The Question Presented Is Not Squarely Implicated Because The Federal Rules Of Civil Procedure Require Application Of New York Law In The Unique Context Of This Case.

Even if this case did not present the fatal vehicular problems discussed above, there would be an additional barrier to this Court's review of the question presented: Because the Second Circuit's choice-of-law analysis was conducted in the context of prejudgment attachments and postjudgment restraints under Federal Rules of Civil Procedure 64 and 69 (*see* Pet. App. 5a-6a), New York law would apply here regardless of whether courts must look to federal common law generally for actions arising under the FSIA.

Rule 69 provides that "[t]he procedure on execution . . . must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Rule 64 likewise states that prejudgment remedies such as "attachment" are available to the extent permitted "under the law of the state where the court is located," unless "a federal statute governs." Fed. R. Civ. P. 64. Because the FSIA does not itself provide for attachment and execution, it is well-settled that in actions arising under the FSIA, courts apply the forum state's law for those ancillary remedies. *See, e.g., Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413, 416 (5th Cir. 2005) ("Because the FSIA does not supply a cause of action, the rule of decision applied to the . . . the underlying gar-

nishment proceeding[] is that of the State of Texas under Fed.R.Civ.P. 69(a)."); *Karaha Bodas*, 313 F.3d at 83 ("In attachment actions involving foreign states, federal courts . . . apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures."). Accordingly, the Second Circuit held in this case that "the district court properly employed the procedures provided under New York law"—a holding that petitioners did not dispute below and do not challenge here. Pet. App. 5a-6a.

Because attachment and execution are governed by the law of the forum state, questions about the scope and application of those remedies, such as whether the assets sought to be restrained belong to a valid trust (Pet. App. 7a), are answered by state law, not federal law. *See, e.g.*, *Schreiber v. Kellogg*, 50 F.3d 264, 267 (3d Cir. 1995) ("Under Rule 69(a) of the Federal Rules of Civil Procedure . . . we look to Pennsylvania law to determine whether Schreiber may execute on Kellogg's interest in the Wanamaker trust."). That includes the threshold application of the forum state's choice-of-law rules. For example, in *Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001), the Seventh Circuit, in a Rule 69 proceeding, applied the forum state's choice-of-law rules to ascertain which state's property law determined whether the property at issue was exempt from execution. *Id.* at 873-74.

The procedural posture of this case would thus frustrate this Court's ability to reach the question presented, which inquires of the choice-of-law rule *generally* in cases arising under the FSIA, not *specifically* of remedial proceedings conducted under Rule 64 or Rule 69. And tellingly, none of the Ninth Circuit precedents on which petitioners rely arose in the Rule 64 or Rule 69 context of this case. *See*

Chiudian v. Philippine Nat'l Bank, 976 F.2d 561 (9th Cir. 1992); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989). Petitioners' assertions that this case "squarely presents" a "direct conflict" (Pet'n at 13) thus seem grossly overstated if not flatly incorrect. And it further seems that if this Court grants certiorari, it would ultimately rest its holding on Rules 64 and 69 and never reach the question presented.[4]

IV. PETITIONERS VASTLY OVERSTATE THE IMPORTANCE OF THE QUESTION PRESENTED.

Petitioners exaggerate the importance of the question presented when they fret that "foreign states subject to jurisdiction in U.S. courts under the FSIA . . . face inconsistent standards on the basic issue of what choice of law rule controls." Pet'n at 14. It is rarely true that "inconsistent standards" govern the choice-of-law question in cases arising under the FSIA, because the majority of states apply the Second Restatement or a similar approach. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 Am. J. Comp. L. 269, 279 (2009). In addition, most states, including the important international-

[4] Respondents had no occasion to highlight the special context of this case below because petitioners did not dispute that New York choice-of-law rules applied. But even if petitioners' failure to assert an argument could be ascribed to respondents, there could be no forfeiture in any event. Respondents are entitled in this Court to "make any argument in support of [their] claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted).

business jurisdiction of New York, apply the Restatement section at issue here, Section 187, governing choice-of-law clauses. *See* Michel A. Jaccard, *Securing Copyright in Transnational Cyberspace*, 35 Colum. J. Transnat'l L. 619, 654 (1997). If this question is as important as petitioners suggest, this Court should await a case that actually presents a conflict between the Second Restatement and a state's choice-of-law rules, should one ever arise.

Moreover, even if the Second Restatement tended to diverge from state law, the uniformity that petitioners claim that their approach would bring to FSIA cases is illusory. Petitioners argue that "what constitutes 'property in the United States' under the FSIA should be determined consistently." Pet'n at 16. But even if courts applied the same *choice-of-law* rule in every case, diverse state *substantive* law would still mean that a foreign nation "could face a multiplicity of results regarding what constitutes 'property in the United States.'" *Id.* That lack of uniformity results from the combination of our federal system and Congress's choice that, absent FSIA immunity, a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. And petitioners' complaint that the law governing "attachment and execution under the FSIA . . . cannot be left to the vagaries of state choice of law rules" (Pet'n at 15-16) rings especially hollow in light of Congress's express choice in Federal Rules of Civil Procedure 64 and 69 to direct federal courts to apply state law to those ancillary remedies.

Further, the asserted split between the Ninth Circuit and all other circuits to consider the question is likely to be self-correcting. As the petition for certiorari makes clear, the Sixth Circuit and the D.C.

Circuit first took a position on the question presented only in 2009. *See* Pet'n at 13 (citing *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835 (D.C. Cir. 2009), and *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 361 (2009)). That fact not only demonstrates the infrequency with which parties dispute which jurisdiction's law will apply in an FSIA case, but also strongly suggests that as additional circuits adopt the Second Circuit's rule, the Ninth Circuit may reconsider its outlier precedent *en banc*.[5]

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[5] Petitioners hint, but do not expressly assert, that the decision below conflicts with this Court's holding in *Bancec*, 462 U.S. 611 (1983). Pet'n at 16-17. That insinuation is incorrect. The footnote that the petitioners cite explained that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622 n.11. Only where the legal question is unique to foreign states—such as "the attribution of liability among entities of a foreign state"—do federal common law rules apply. Here, the question the Second Circuit answered was whether a choice-of-law provision in a trust instrument must be disregarded—a question that is not unique to foreign nations, as petitioners implicitly concede through their reliance on the generally applicable principles of the Second Restatement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID W. RIVKIN
JOHN B. MISSING
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Respondent EM Ltd.

ROBERT A. COHEN
Counsel of Record
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6797
(215) 963-5000
robert.cohen@dechert.com

Counsel for Respondent NML Capital, Ltd.

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